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In the Supreme Court of the United States

OCTOBER TERM, 1995

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 737, ET AL., PETITIONERS

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Credit Union Administration Board (the Board), as conservator of a failed credit union, lawfully repudiated the credit union's collective bargaining agreement under Section 207(c)(1) of the Federal Credit Union Act, 12 U.S.C. 1787(c)(1), upon the Board's determination that the collective bargaining agreement was "burdensome" and that its repudiation would "promote the orderly administration of the credit union's affairs."

2. Whether the Board's regional director was entitled to qualified immunity for his role in repudiating the collective bargaining agreement.

3. Whether credit union employees who were terminated or constructively discharged after the Board's repudiation of the collective bargaining agreement were deprived without due process of a property interest in continued employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 72 F.3d 1243. The opinion of the district court (Pet. App. 19a-45a) is reported at 858 F. Supp. 711.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1996. A petition for rehearing was denied on February 23, 1996. Pet. App. 50a. The petition for a writ of certiorari was filed on May 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal credit unions are instrumentalities of federal law, established under the Federal Credit Union Act (the Act), 12 U.S.C. 1751 *et seq.*, for "the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes." 12 U.S.C. 1752(1). They operate under charters issued by the National Credit Union Administration (NCUA), an independent agency in the executive branch, and their powers and operations are governed by federal law. 12 U.S.C. 1753-1765.

Management of the NCUA is vested in the National Credit Union Administration Board (the Board), 12 U.S.C. 1752a(a), to which Congress has delegated responsibility for the organization, examination, regulation, and deposit insurance of federal credit unions, 12 U.S.C. 1766-1789. Among the Board's powers is the right to appoint itself or another as conservator when the Board determines that such action is necessary to conserve the assets of an insured credit union, or to protect the insurance fund or members of the credit union. 12 U.S.C. 1786(h)(1)(A). The conservator succeeds to "all rights, titles, powers, and privileges of the credit union," 12 U.S.C. 1787(b)(2)(A), operates the credit union with all the powers of its members, directors and officers, and performs all functions of the credit union in the name of the credit union, 12 U.S.C. 1787(b)(2)(B).

The conservator of a federal credit union is empowered generally to take actions necessary to put the credit union in "a sound and solvent condition" and appropriate to carry on the business of the credit union, while preserving its assets. 12 U.S.C.

1787(b)(2)(D). In addition to those general powers, the conservator has express authority, under 12 U.S.C. 1787(c), to disaffirm or repudiate "any contract" to which the credit union is a party, if the conservator, in its "discretion," determines (i) that performance of the contract would be "burdensome" and (ii) that repudiation of the contract "will promote the orderly administration of the credit union's affairs." 12 U.S.C. 1787(c)(1). The conservator must exercise the option to repudiate within a reasonable time after institution of the conservatorship. 12 U.S.C. 1787(c)(2). The credit union is liable for damages caused by the conservator's repudiation of a contract, but its liability is limited to "actual direct compensatory damages" determined as of the date of the conservator's appointment. 12 U.S.C. 1787(c)(3).

2. In December 1991, the Board appointed itself as conservator for the Auto Glass Employees Federal Credit Union (the Credit Union), a financially troubled institution operating in Nashville, Tennessee. The Board named respondent H. Allen Carver, the Board's regional director, to oversee the Credit Union's management. At that time, the Credit Union was a party to a collective bargaining agreement with Local 737 of the United Automobile, Aerospace, and Agricultural Implement Workers of America (the Union), which represented a majority of the Credit Union's non-management employees. Pet. App. 3a.

Immediately following its appointment as conservator, the Board instituted various modifications in the Credit Union's work rules and policies. Pet. App. 3a. At a later meeting between the Board's agents and Union representatives, the Board proposed several changes to the collective bargaining agreement that the Board deemed necessary to improve the Credit

Union's precarious financial condition. *Id.* at 22a-23a. The Union rejected those proposals. *Id.* at 3a. Shortly thereafter, the Board repudiated the collective bargaining agreement and instituted new wage rates and employee benefits. *Id.* at 3a-4a, 23a.

3. Petitioners comprise the Union and 11 current or former employees who were allegedly terminated or constructively discharged as a result of the Board's repudiation of the collective bargaining agreement. They filed suit in the United States District Court for the Middle District of Tennessee, challenging the repudiation of the collective bargaining agreement as violative of their federal constitutional and statutory rights. They sought declaratory relief and compensatory and punitive damages, and named as defendants, among others, the NCUA, the Board, the Credit Union, and H. Allen Carver (in his individual capacity). Pet. App. 4a.

Respondent Carver moved to dismiss the claims against him on the basis of qualified immunity. His motion was referred to a magistrate judge, who recommended that dismissal be granted. Since petitioners could point to no case law supporting their argument that the repudiation of the collective bargaining agreement infringed their statutory or constitutional rights, the magistrate judge concluded that, even if Carver were responsible for the decision to repudiate, he would thereby have violated no clearly established law of which a reasonable person would have been aware. Pet. App. 60a-61a.[1] The

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[1] The magistrate judge also recommended that the NCUA be dismissed as a defendant, on the ground that, as between the NCUA and the Board, the Board was the proper party to the

district court adopted the magistrate judge's recommendation in its entirety. *Id.* at 51a.

On later cross-motions for summary judgment, the district court concluded that, under the plain language of the Act, 12 U.S.C. 1787(c)(1), the Board was authorized to repudiate the collective bargaining agreement upon the Board's determination that the collective bargaining agreement was burdensome and that its repudiation would promote the orderly administration of the Credit Union's affairs. Pet. App. 27a-32a. The court further held that the collective bargaining agreement did not confer on the individual respondents any constitutionally protected property right to continued employment. *Id.* at 32a-34a.[2]

4. The court of appeals affirmed. Pet. App. 1a-18a. It observed that Section 1787(c)(1) "unequivocally grants authority to conservators to repudiate 'any contract,'" and that collective bargaining agreements "are clearly 'contracts.'" *Id.* at 8a-9a. In light of Congress's express limitation of the conservator's authority to repudiate certain other types of contracts, the court refused to read into the Act any implied exception for collective bargaining agreements. *Id.* at 9a.

The court also looked to the plain language of the Act for the standard applicable to repudiation of a collective bargaining agreement, rejecting petitioners' invitation to impose a judicially crafted standard. Pet. App. 10a-13a. The court observed that the Act

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action. Pet. App. 59a. Petitioners did not contest that recommendation. *Id.* at 51a n.1.

[2] The court also made several other rulings (Pet. App. 34a-45a), but the claims affected by those rulings have since been dismissed by stipulation (*id.* at 4a).

vests in the conservator's sole discretion the decision to repudiate "any contract" that the conservator believes "burdensome," when the conservator determines that repudiation of the contract would "promote the orderly administration of the credit union's affairs." *Id.* at 11a-12a (quoting 12 U.S.C. 1787(c)(1)). Congress's specification of a standard applicable to *all* contracts left no room, in the court's view, for imposition by judicial fiat of a different standard with regard to collective bargaining agreements. *Ibid.* The court rejected as implausible petitioners' suggestion that Congress had merely failed to focus on the need for a different statutory standard for collective bargaining agreements. Given Congress's then-recent specification of a special standard applicable to the repudiation of collective bargaining agreements in bankruptcy (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541(a), 98 Stat. 390), the court was persuaded that the absence of any such provision in the Act "reflect[ed] a legislative judgment 'that the conservator of a failing credit union should be given broader powers than a trustee or debtor-in-possession of a private enterprise.'" Pet. App. 12a.

The court also rejected petitioners' claim that the Board's repudiation of the collective bargaining agreement violated their Fifth Amendment rights to due process. Pet. App. 13a-16a. The court understood petitioners' claim to be based on a property interest in continued employment allegedly arising from the collective bargaining agreement. Although the court acknowledged that "property interests protected by the Fifth Amendment may be created by virtue of purely private contractual agreements," *id.* at 14a, it concluded that nothing in the collective bargaining

agreement gave any assurance of continued employment, *id.* at 14a-15a.

Finally, the court of appeals affirmed the district court's dismissal of respondent Carver on qualified immunity grounds. Like the district court, it concluded that a reasonable person would not have believed that repudiation of the collective bargaining agreement in a manner authorized by the plain text of Section 1787(c)(1) would violate petitioners' clearly established statutory or constitutional rights. Pet. App. 16a-18a.

ARGUMENT

1. Petitioners argue (Pet. 14-16) that the Board lacks authority as conservator to repudiate collective bargaining agreements. The court of appeals correctly concluded to the contrary that the conservator's authority to repudiate "any contract" includes the authority to repudiate a collective bargaining agreement, and its decision does not conflict with any decision of this Court or of any other court of appeals. See Pet. 10 (conceding that this case "is one of first impression"). The matter warrants no further review.

The decision of the court of appeals in this case is strikingly similar to this Court's decision in *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522 (1984). That case involved the repudiation by a debtor-in-possession of a collective bargaining agreement covered by the National Labor Relations Act (NLRA). The Bankruptcy Code authorized a trustee or debtor-in-possession, "subject to the court's approval, [to] assume or reject *any executory contract* * * * of the debtor." 11 U.S.C. 365(a) (1982) (emphasis added). This Court read "any executory contract," in accor-

dance with its ordinary meaning, to include collective bargaining agreements. *Bildisco*, 465 U.S. at 521-522. It observed, moreover, that Section 365(a) expressly limited a debtor-in-possession's authority to reject several other types of executory contracts (including collective bargaining agreements covered by the Railway Labor Act), and concluded therefrom that "Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to." *Id.* at 522-523. Congress's failure expressly to exclude collective bargaining agreements covered by the NLRA "indicate[d] that Congress intended that § 365(a) apply to all [such] collective-bargaining agreements." *Id.* at 523.

The Federal Credit Union Act similarly authorizes the conservator of an insured credit union to repudiate "*any contract* * * * to which such credit union is a party" upon certain findings by the conservator. 12 U.S.C. 1787(c)(1) (emphasis added). Just as a collective bargaining agreement is an "executory contract," it is even more clearly a "contract" simpliciter. Thus, just as Section 365(a) of the Bankruptcy Code authorized the repudiation in *Bildisco* of the debtor's collective bargaining agreement in bankruptcy, so too Section 1787(c)(1) authorizes the repudiation of a federal credit union's collective bargaining agreement in conservatorship.

In addition, like the Bankruptcy Code, the structure of the Act indicates that the absence of an exemption for collective bargaining agreements is the result of congressional design. The Act contains specific language limiting the conservator's power of repudiation for named classes of contracts. See 12 U.S.C. 1787(c)(4)(A) and (5)(A) (leases), 1787(c)(4)(B) and (5)(B) (rent payments), 1787(c)(6) (sale of real

property), 1787(c)(7) (service contracts), 1787(c)(8) (certain financial contracts). Those express limitations demonstrate that Congress was aware of the breadth of the repudiation power and able to craft exceptions to it. The absence of any express limitation with regard to collective bargaining agreements is potent evidence that Congress intended no such limitation.[3]

2. Equally unavailing is petitioners' contention (Pet. 10-13) that a conservator must apply a heightened, judicially crafted standard in determining whether to repudiate a collective bargaining agreement. While petitioners complain (Pet. 13) that the

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[3] Congress superseded the result in *Bildisco* by enacting 11 U.S.C. 1113, which limits the authority of a trustee or debtor-in-possession to reject a collective bargaining agreement covered by the NLRA. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541(a), 98 Stat. 390. Congress's enactment of Section 1113 attests to its appreciation of the special concerns implicated by the repudiation of collective bargaining agreements. In petitioners' view, Congress's response to *Bildisco* renders it improbable that Congress intended to authorize the conservator of an insured credit union to repudiate the credit union's collective bargaining agreements. Pet. 14-16. Petitioners infer (Pet. 15) from the Act's silence on the matter that Congress likely "never considered the impact of the [Act] on labor management agreements." It would be odd, in the span of a mere five years (Section 1787(c) was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989), for Congress to forget the implication for collective bargaining agreements of statutory provisions authorizing the repudiation of contracts. In light of *Bildisco* and its aftermath, it is far more likely that Congress considered the matter and concluded "that the conservator of a failing credit union should be given broader powers than a trustee or debtor-in-possession of a private enterprise." Pet. App. 12a.

Board repudiated the collective bargaining agreement based solely on its belief that the collective bargaining agreement was "burdensome" and that its repudiation would "promote the orderly administration of the credit union's affairs," those determinations by the Board are the express statutory prerequisites for its repudiation of a contract. See 12 U.S.C. 1787(c)(1). Judicial imposition of the heightened standard favored by petitioners would substitute the judgment of the courts for that of Congress.

Although this Court in *Bildisco* approved the application of a judicially crafted standard to govern the repudiation of collective bargaining agreements, 465 U.S. at 523-527, *Bildisco* provides petitioners no support. Under Section 365(a) of the Bankruptcy Code, the provision at issue in *Bildisco*, the rejection of a contract in bankruptcy was "subject to the court's approval." 11 U.S.C. 365(a) (1982). Since the Bankruptcy Code provided no express standards to guide the courts in that regard, this Court interpreted the Code to require consideration of all relevant factors, including the special nature of collective bargaining agreements. *Bildisco*, 465 U.S. at 523-524. That approach was consistent with the traditional role of bankruptcy courts, as courts of equity. *Id.* at 527.

The Act, in contrast, does not leave to the courts' equitable discretion the decision whether to repudiate a credit union's contracts in conservatorship. Rather, the Act entrusts that decision to the discretion of the appointed conservator, upon its finding that a contract is burdensome and that repudiation of the contract would promote the orderly administra-

tion of the credit union's affairs.[4] Because the Act specifies the circumstances under which the conservator has discretion to repudiate a contract, the courts have no authority, nor any warrant, to impose additional requirements.

3. Petitioners argue (Pet. 16-20) that respondent Carver was not entitled to qualified immunity for his role in repudiating the collective bargaining agreement. That is incorrect. Qualified immunity shields government officials performing discretionary functions from liability for money damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (citing *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978)). The availability of qualified immunity turns on the "objective reasonableness of [the] official's conduct," in light of the legal rules "clearly established at the time an action occurred." *Ibid.* Here, the court of appeals' conclusion that the Board's repudiation of the collective bargaining agreement did not deprive petitioners of any statutory or constitutional rights validated (and mooted,

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[4] The courts of appeals that have interpreted a closely related provision of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e), have uniformly held that, given the broad discretion vested in the conservator, the conservator is under no obligation to make formal findings to support its determination that a contract is "burdensome" or that repudiation is necessary to "promote the orderly administration of the institution's affairs." See *1185 Ave. of Americas Assocs.* v. *RTC*, 22 F.3d 494, 498 (2d Cir. 1994); *Hennessy* v. *FDIC*, 58 F.3d 908, 919-920 (3d Cir. 1995), cert. dismissed, 116 S. Ct. 688 (1995), and cert. denied, 116 S. Ct. 1318 (1996); *Monrad* v. *FDIC*, 62 F.3d 1169, 1172 (9th Cir. 1995).

for all practical purposes) the district court's determination that Carver was shielded by qualified immunity for his role in the repudiation. The district court's determination was, moreover, plainly correct when made. In light of Section 1787(c)(1)'s express grant of discretionary authority to repudiate "any contract," a reasonable person would not have assumed that the repudiation of the collective bargaining agreement in conformity with the Act's requirements would violate petitioners' rights, particularly in the absence of any case law supporting petitioners' reading of the Act.[5]

4. Finally, petitioners argue (Pet. 20-24) that they had a constitutionally cognizable property interest in continued employment created by the collective bargaining agreement that was infringed by the Board's repudiation of the agreement without a prior hearing. That argument is without merit. The Credit Union was chartered, organized, insured, and comprehensively regulated under the Act, and its contractual relations—including those created by the collective bargaining agreement—were from their

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[5] Contrary to petitioners' suggestion (Pet. 17-18), the district court appropriately determined Carver's qualified immunity on the basis of the pleadings. Because "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), this Court has "repeatedly * * * stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam); *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987). Here, no discovery was necessary to determine that Carver was entitled to qualified immunity, since no additional fact-finding could have altered the lower courts' determination that repudiation did not violate any clearly established legal rights.

inception subject to the Act's provisions and limitations, including the possibility of repudiation upon the appointment of a conservator. Thus, even if we assume (contrary to its provisions) that the collective bargaining agreement created a right to continued employment, that right pertained only insofar as the Credit Union operated outside of conservatorship or receivership. Once the Board appointed itself as conservator for the Credit Union—an action that petitioners do not contest—the collective bargaining agreement could not be enforced in derogation of the Board's statutory authority, see *Bildisco*, 465 U.S. at 532, and any rights remaining under the agreement became subject to the Board's repudiation powers. Because the collective bargaining agreement could not confer on petitioners a property right that was impervious to the appointment of a conservator, the lower courts correctly concluded that the Board's repudiation of the collective bargaining agreement did not violate petitioners' due process rights.

To the extent that petitioners' complaint in the court of appeals was that the Board abused its discretion in determining to repudiate the collective bargaining agreement (see Pet. App. 12a-13a), petitioners have been accorded a constitutionally sufficient opportunity for redress. The requirements of due process may be satisfied through provision for a post-deprivation hearing in cases in which there is a need for immediate governmental action. See *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981). This Court has recognized that maintaining the soundness of the banking system often necessitates prompt governmental action. On that ground, it has rejected the notion that due process requires a hearing before a seizure of the assets of a troubled financial insti-

tution association through the appointment of a conservator or receiver. *Fahey* v. *Mallonee*, 332 U.S. 245, 253 (1947); accord *First Fed. Sav. Bank & Trust* v. *Ryan*, 927 F.2d 1345, 1357-1358 (6th Cir.), cert. denied, 502 U.S. 864 (1991); *Bingham* v. *National Credit Union Admin. Bd.*, 927 F.2d 282, 286 n.3 (6th Cir.), cert. denied, 502 U.S. 817 (1991). Just as a post-deprivation hearing is sufficient for a challenge to the summary seizure of all of the assets possessed by a financial institution, it is no less sufficient for a challenge to the repudiation of a single contract to which the institution was a party.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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